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In the Supreme Court of the United States

RANGER CELLULAR
AND
MILLER COMMUNICATIONS, INC.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
UNITED STATES OF AMERICA

PETITION FOR *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

(1) The Communications Act expressly confers standing on Federal Communications Commission applicants to appeal the denial of their own license applications and the grant of their mutually exclusive competitors' to the D.C. Circuit Court of Appeals. May that court deny appellate standing to such a litigant on the grounds that, if the litigant prevails, the FCC might then change its rules in such a way that the litigant would have little chance of winning the resulting auction?

(2) Can present Article III standing be defeated by "prospective mootness," *i.e.*, the supposition that uncertain future events, if they occur, will reduce the likelihood that a litigant's injury would be redressed by a favorable decision?

(3) May an administrative agency shield itself from judicial review of unlawful licensing actions by suggesting to the reviewing court that, if it loses the appeal, it will simply open up the license at issue to new filers, thereby negating the standing of the original applicants – and everyone else – to challenge the unlawful action?

PARTIES AND RULE 29.6 DISCLOSURES

The parties-appellant before the United States Court of Appeals for the District of Columbia Circuit were Petitioners Ranger Cellular ("Ranger") and Miller Communications, Inc. ("Miller"). The Federal Communications Commission ("FCC") and United States of America were the appellees. Intervenors on the side of the FCC were Great Western Cellular Partners, LLC, Comnet of Florida,[1] Endless Mountain Wireless, L.L.C.,[2] WWC Holding Co., Inc., and Cingular Wireless, L.L.C. (on behalf of itself and two subsidiaries CCPR Services, Inc. and Southwestern Bell Wireless, L.L.C.)

Ranger is a general partnership without any subsidiaries, parent companies or affiliates which have issued shares or debt securities. Miller is a closely held Florida corporation without any subsidiaries, parent companies or affiliates which have issued shares or debt securities.

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[1]This is the successor-in-interest to Monroe Telephone Services, L.L.C.

[2]This is the successor-in-interest to FutureWave Partners, L.L.C.

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PETITION FOR *WRIT OF CERTIORARI*

Petitioners Ranger and Miller, by their attorneys, respectfully petition for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit (Pet. App. 1) is reported at 348 F.3d 1044 (2003). Its Orders denying reconsideration and reconsideration *en banc* are reported at *Ranger Cellular v. FCC*, No. 02-1155, (D.C. Cir. Jan. 28, 2004) (Pet. App. 14-15). The FCC's decision denying Ranger's and Miller's applications and granting the mutually exclusive applications is reported at 17 F.C.C.R. 8508 (2002) (Pet. App. 16).

JURISDICTION

The judgment of the D.C. Circuit was originally entered on November 14, 2003. Its Order denying rehearing *en banc* was entered on January 28, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The jurisdiction of the Court of Appeals was invoked under 47 U.S.C. Section 402(b).

PERTINENT STATUTE

47 U.S.C. Section 402(b):

Right to appeal :

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission....

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

STATEMENT OF THE CASE

The present case marks the farthest advance yet in the D.C. Circuit's on-going campaign to bar litigants from the federal court house. This case represents a watershed in administrative jurisprudence because it is the first time in the seventy-year history of the Communications Act of 1934 that the D.C. Circuit has denied an FCC applicant the right to seek the judicial review of an adverse licensing decision which is expressly afforded by the Act. By extending the Article III standing requirement of "redressability of grievances" well beyond anything envisioned by this

Court in *Lujan*[3], the D.C. Circuit has established a high and hitherto unrecognized hurdle for FCC applicants to overcome before they can seek judicial review of FCC licensing actions. Since similar considerations apply to review of the actions of many administrative agencies under the Administrative Procedures Act, the court's decision threatens to bar judicial review on standing grounds to a broad universe of administrative actions throughout the Federal government.

This case is about two FCC applicants, Petitioners Ranger and Miller, who have been struggling for almost sixteen years for an opportunity to obtain cellular radio licenses in four markets.[4] The FCC dismissed their applications when it shifted from a lottery method of awarding licenses to an auction method because it believed that it was unqualifiedly required to dismiss them. Instead of holding an auction, however, the FCC then proceeded to grant the applications of their mutually exclusive competitors in what Petitioners allege was unconstitutional contravention of the separation of powers doctrine[5] and a violation of an

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[3] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

[4] Petitioners originally challenged the erroneous dismissal of their application in a total of eight markets, but the FCC's decision to open the auction to new bidders in four of the markets effectively mooted the appeal with respect to those four markets. See *Ranger Cellular v. FCC*, 333 F. 3d 255 (D.C. Cir. 2003), *cert. den.*, *Ranger Cellular v. FCC*, Case No. 03-831, April 19, 2004.

[5] In 2000, Congress passed the *Launching Our Communities' Access to Local Television Act of 2000*, 114 Stat. 2762 (2000). This special interest legislation, passed without hearings,

express Congressional prohibition on awarding licenses by lottery.[6] When Ranger and Miller, under 47. U.S.C. 402(b), appealed a) the dismissal of their own applications and b) the grant of the others, the D.C. Circuit dismissed the appeal. It ruled that, in the event the appeal was successful and the case was remanded to the FCC to hold a lawful auction, the FCC would probably just adopt new rules that would open the process to new applicants. (Court of Appeals Decision at p. 7, n. 4; Pet. App. 7) Because the court believed that Ranger and Miller would have little chance of winning such a hypothetical auction under these

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debate or explanation in the legislative record, resurrected the long moribund applications of three companies which had won lotteries but were later disqualified as cellular applicants in the early 1990's. The statute reversed by legislative fiat the FCC's disqualification of these applicants in three markets and ordered their reinstatement. Because the disqualifications had been expressly affirmed by both the D.C. Circuit and this Court, Ranger and Miller, citing *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995) objected that Congress had legislatively usurped the exclusive constitutional prerogative of Article III courts to finally resolve cases. The FCC nevertheless reinstated the applications as Congress had directed, thus precluding Ranger and Miller from having an opportunity to bid for these licenses at auction. The lawfulness of the FCC's adherence to the Congressional directive rather than to the final judgment of Article III courts is one of the substantive issues which was raised before the D.C. Circuit.

[6] One of the four licenses whose award is challenged was awarded by lottery after Congress prohibited the FCC from issuing any more licenses by that method.

hypothetical new rules, their grievance – the dismissal of their applications and the grant of their competitors' – was not redressable for Article III standing purposes. Their appeal was therefore dismissed. That standing determination is what is challenged here.

The circuitous sequence of events that brought us to this pass followed an unusually tortuous course. The cellular radio applications at issue in this case were filed pursuant to deadlines established in 1988 and 1989 for eight different rural service areas in the United States. In each of these markets, the applications of Ranger and Miller and those of the applicants who were eventually awarded licenses by FCC were mutually exclusive – *i.e.*, the grant of one in each market precluded the grant of the others. The tentative selectees originally chosen for these markets by lottery were disqualified for various reasons in the early 1990s. Under the FCC's rules, the remaining applicants were retained as a closed pool from which to choose a new selectee. 47 C.F.R. 1.823(a)(3)(1989). *Amendment of Commissions Rules for Rural Cellular Radio Service*, 2 F.C.C.R. 4008 (1987).

The FCC delayed re-commencing the licensing process until Congress had passed the Balanced Budget Act of 1997 (BBA).[7, 8] The FCC thereupon dismissed all of the pending applications, including those of

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[7] The FCC had held a re-lottery for two of the markets in 1992 but had not processed the winning applications.

[8] *Balanced Budget Act of 1997*, 111 Stat. 251 (1997) ("BBA").

Ranger and Miller, on the ground that the BBA required it.[9] However, it later reinstated two of the winning lottery applications, granting one and eventually dismissing the other on grounds unrelated to the present case. This was done despite the BBA's strict prohibition on the issuance of any license by the FCC after 1997 based on a lottery. The erroneous dismissal of Ranger's and Miller's applications and the grant of the lottery-winning application are two of the points raised on appeal.

While these proceedings were working their way through the FCC, the Commission decided to open a rulemaking proceeding covering four cellular markets not at issue here.[10] Because the licenses for these markets were vacant, the FCC wanted to establish rules governing the auctions which would have to be held to award licenses. Over Ranger's and Miller's objection, the FCC decided to open the auction for those four markets (the "Open Markets") to new applicants rather than limiting it to the group of applicants who had filed prior to the specified deadline. With respect to the four different markets involved in the present petition (the "Closed Markets"), the FCC took no action to alter the applicable licensing procedure. In these markets, therefore, Ranger, Miller and possibly one other

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[9]The BBA forbade the FCC from issuing any more licenses based on a lottery but instead required it to award licenses by auction.

[10] *In the Matter of Implementation of Certain Competitive Bidding Rules to License Certain Rural Service Areas*, 17 F.C.C.R. 1960 (2002).

applicant are presently the only remaining applicants who timely filed applications for the licenses. The present appeal addresses only the Closed Markets, except insofar as the Court is requested to remand the applications in one Open Market (Chambers, Indiana) for consideration by the FCC of a settlement agreement.

After appropriate appeals within the agency, the FCC consolidated in a single order its grant of the lottery-winning application, its grant of the three applications which had been legislatively resurrected, and its dismissal of the competing applications of Ranger and Miller. This order was timely appealed to the D.C. Circuit under the provisions of 47 U.S.C. 402(b). That court is the exclusive venue established by Congress for judicial review of such actions. *Id.*

Ranger's and Miller's appeal focused on the FCC's violation of two statutes, its unexplained break with its own long-standing precedent, and the unconstitutionality of the Congressional action overturning a final judgment of this Court and the Court of Appeals. The appeal also addressed the dismissal of Ranger's and Miller's applications for the Open Markets because at the time the briefs were filed the D.C. Circuit had not yet determined the lawfulness of the FCC's rulemaking action opening the Open Markets to new filers.

The FCC and intervenors argued that Ranger and Miller had no standing to challenge the licensing actions because the Commission had opened the licensing process to new applicants in the four Open Markets. Therefore, they argued, if Ranger and Miller won the appeal, they would only win the right to

participate in an auction with the world at large a right which the FCC had already given them in the three markets which had been auctioned. (Miller and Ranger had conceded that under the rules adopted for those auctions, their chances of winning would be negligible.) Under the law of standing, their grievance would not be "redressable." This argument, while not necessarily compelling even for the Open Markets, could not possibly apply with respect to the four Closed Markets at issue here because the FCC has not even *proposed* to open the markets to new filers, much less done so. In these four markets, Ranger and Miller are the only two remaining applicants.[11] Unless the rules are changed by the FCC, they are the only applicants eligible to participate in the auction, and one of them would necessarily be the winner.

In order to change the rules and establish procedures governing the auction for the four Closed Markets, the FCC would have to open a notice and comment rulemaking proceeding similar to the one it undertook for the Open Markets, receive and consider public comments, examine the particular equities and circumstances of the markets at issue, determine whether the auction should be open or closed, and decide what other procedures, including bidding credits for small businesses, should apply. The outcome and particulars of such a rulemaking proceeding are, of course, wholly unknown. Ranger's and Miller's

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[11] In one of the four markets at issue, a third applicant, the lottery winner erroneously awarded the license in 2000, would potentially be eligible for the auction in that market.

chances of winning the auction will vary significantly depending on the outcome of that rulemaking.

The D.C. Circuit nevertheless issued an opinion dismissing the appeals in all eight markets on standing grounds. *Ranger Cellular v. FCC,* 348 F. 3d 1044 (D.C. Cir. 2003). (Pet. App. 1) It acknowledged that the FCC's earlier rulemaking "technically" covered only the four Open Markets, but the court opined that "there is little doubt that the FCC would follow that recent precedent were Ranger/Miller to win this appeal and overturn the four licenses they have challenged here." *Id.* at footnote 4. (Pet. App at 7) The court explained, with several misstatements of fact,[12] why it thought the FCC was likely to adopt rules for the Closed Markets identical to those it had established for

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[12]Among other errors, the court thought that the FCC's rulemaking applied to the only markets which were available because the initial winner was disqualified or had withdrawn its application. *Id.* at footnote 4. In fact, in one of the four markets at issue in the first rulemaking, the FCC designated a lottery winning applicant for hearing and that applicant was vigorously contesting its qualifications to be the licensee. The court also seemed to think that Ranger and Miller had conceded that they could not win an open auction in the four markets involved here; in fact, they had only suggested that their chances of winning were highly limited in the four markets where the Commission had actually adopted new lottery rules. Without knowing what rules the FCC might adopt in the other four markets, Ranger and Miller could have no basis whatsoever for knowing what their chances of winning would be, and they certainly made no such concession.

the Open Markets. Having thus hypothesized the creation of a new regulatory framework in which Ranger and Miller would not be likely to win the resulting auction, the court was able to easily conclude that Ranger's and Miller's chances of winning an auction under that hypothetical regime were "illusory," and the grievances raised in their appeal were therefore not redressable.

In addition, since, under established precedent in the D.C. Circuit[13], potential new filers have no standing to challenge a licensing decision, no other person in the world who might have been interested in applying for these licenses has standing to challenge the FCC's unlawful award. The result is that the award of four licenses by the FCC in patent contravention of both the Communications Act and the Constitution has been immunized from challenge in any court of law. Under the Court of Appeals' decision, no one, no matter how much they have been, or are, willing to bid for these licenses, has standing to raise the illegality of the FCC's acts.

The D.C. Circuit denied rehearing and rehearing *en banc*,[14] and this petition followed.

FACTORS WARRANTING *CERTIORARI*

1. The Communications Act expressly confers standing on applicants for FCC licenses to appeal adverse decisions to the D.C. Circuit. That court is the

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[13] *Free Air Corp. v FCC*, 130 F. 3d 447 (D.C. Cir. 1997).

[14] Pet. App. at 14-15.

exclusive venue for such appeals. In the 70-year history of the Act, the D.C. Circuit had *never before* required a losing applicant to make a threshold showing that it has a substantial likelihood of winning the license on remand as a predicate to a challenge of the winning applicant. The ruling here creates a new and severe limitation on the broad right of judicial review granted by Congress and consistently acknowledged by the courts. Because the D.C. Circuit is the sole court with jurisdiction to hear these appeals, applicants seeking judicial redress will have no other avenue of redress. Moreover, because the D.C. Circuit hears appeals from many other federal administrative agencies, its ruling here will have a far-reaching exclusionary effect on appeals from other agencies with similar licensing procedures.

2. The third prong of the Article III standing analysis established by this Court in *Lujan*, *supra*, requires a litigant's grievance to be "redressable." The D.C. Circuit has now stretched that criterion into a kind of preliminary assessment of the litigant's likelihood of success on the merits. In the administrative context, a reviewing court must now conduct an *ad hoc* inquiry into what it thinks the agency will do if the litigant is successful before the court. If the court concludes that the litigant has little chance of succeeding at the agency on remand, the appeal, even if otherwise meritorious, will be dismissed for lack of standing, as happened here. By requiring an evaluation of likelihood of success on the merits before taking jurisdiction – an evaluation which necessarily involves considerable guesswork as to what the agency will do when

presented with facts which even the agency does not yet have – the D.C. Circuit has taken the concept of "redressability" well beyond anything this Court has ever endorsed or considered. Instead of ensuring that a real "case or controversy" exists, standing has instead become a formidable barrier to those seeking to challenge unlawful activity in federal courts.

To illustrate, if Rep. Kucinich had filed suit in federal court alleging violations of election laws earlier this year, under the D.C. Circuit's new approach, his case would have been dismissed for lack of standing. The court would have determined as a preliminary matter that Mr. Kucinich had virtually no chance of winning the primary election even if he were successful in proving a violation of the law by his competitors. His grievance would therefore be deemed nonredressable, no matter how meritorious, because reversal of the legal error would not help him win the prize of being elected. Redressability has become confused with likelihood of success on the merits.

3. The D.C. Circuit's decision grants administrative agencies the power to immunize themselves from judicial review ordained by Congress. An agency which has engaged in unlawful licensing activity need only threaten to change the licensing process after the appeal so that the originally aggrieved applicants (who would have won the appeal on the merits) would now have a significantly reduced chance of winning the license after remand. By simply raising such a prospect, the agency can render the grievances of the original applicants nonredressable and therefore not subject to judicial review. In the present context, the

FCC has been able to award a license by lottery in direct contravention of the statutory prohibition and award licenses unconstitutionally to three applicants whose applications had been finally dismissed by orders of Article III courts. These actions worked to the direct detriment of not only the original mutually exclusive applicants like Miller and Ranger, but all other prospective applicants who might have wanted a chance to bid on these licenses in a lawful auction. Yet under the D.C. Circuit's ruling, there is now no one in the world who has standing to challenge the FCC's patently unlawful actions.

ARGUMENT

The substantive issues raised before the court of appeals are of indisputable constitutional and statutory importance. Congress enacted legislation unabashedly reversing adjudicatory decisions of the FCC which had been affirmed by the D.C. Circuit and reviewed by this Court. This directly raised the question of whether the Congressional action trod impermissibly on the exclusive prerogative of Article III courts to decide cases. Petitioners also raised the question of whether the FCC could continue to grant licenses to lottery winners after Congress had enacted legislation forbidding the use of lotteries for this purpose. These important points of law were never reached because the court denied Ranger and Miller standing to appeal the dismissal of their own applications and the grant of the other applications at issue. The conception of standing newly espoused by the D.C. Circuit not only violates

this Court's teachings on standing, but raises a high constitutional hurdle to federal courts for administrative litigants which this Court has never embraced and which Congress never intended.

The irreducible constitutional minimum for standing to seek relief in Federal court consists of three elements: (1) that there be an injury in fact, (2) that there be a causal connection between the injury and the conduct complained of, and (3) "that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Bennet v. Spear*, 520 U.S. 154, 167 (1997); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). The D.C. Circuit's decision turned entirely on its analysis of the third prong, redressability.

The court recognized that the "likely-to-be-redressed" standard does not require a litigant to demonstrate that it is *certain* to receive the benefit of which it had been deprived the opportunity to compete, but neither may that opportunity be "entirely 'illusory.'" (D.C. Circuit Decision at p. 9, Pet. App. at 9) The case at bar calls for this Court to clarify how "likely" the possibility of relief has to be to satisfy Article III requirements.

A. Defining the Grievance to Be Redressed

The starting point for any Article III redressability analysis must be to define exactly what the grievance is for which redress is being sought. Here Ranger and Miller were seeking two forms of relief from the court of appeals: 1) the reversal of the FCC's grant of four applications on the grounds that those actions were unconstitutional and contrary to the Communications

Act, and 2) the reinstatement of their own applications so that they could have an opportunity to compete for the licenses. They did not ask that either of them be awarded the licenses, but only that the licenses be made available again so that they, the original, timely filed applicants, could have a chance to obtain the licenses in accordance with the FCC's procedures. Ranger and Miller fully understand that upon remand the Commission may adopt rules which could diminish their chances of winning from the present 100% to something less than that. All they are seeking at this point is a chance to compete using the auction procedures established by Congress – something which the FCC's actions have unlawfully denied them.

The fact that an individual applicant's chances of winning may be uncertain has never been a bar to standing to challenge unlawful agency activity. For example, the FCC used to award licenses by lottery. There were as many as five or six hundred applicants, each with an equally small chance to win the license at issue. Under the rule applied by the D.C. Circuit here, none of these applicants would have had standing to challenge the unlawful award of the license by the FCC because each of their chances to win the license would be "negligible." Indeed, the lottery participants' chances would be *less* than Ranger and Miller's under any potential scenario that could develop here. Yet, this Court has often observed that injuries are real even when they are small ones shared by many people. Whether it is a $5.00 fine or a $1.50 poll tax, "an

identifiable trifle is enough for standing to fight out a question of principle."[15]

The fact that Petitioners are here seeking *procedural* relief is significant under standing jurisprudence. In *Lujan*, *supra*, this Court recognized that procedural rights are "special."

> The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered ....

Id. at 573. Here the D.C. Circuit recognized that Ranger and Miller have suffered the loss of the opportunity to pursue a benefit because the FCC awarded the licenses to others. (D.C. Circuit Decision at p. 8-9; Pet. App at 8-9) The court nevertheless set the standing threshold so as to require Ranger and Miller to establish with some certainty that they would have a "realistic possibility" of winning the licenses under the as yet unknown new FCC rules. Not only was

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[15] *U.S. v. SCRAP*, 412 U.S. 669, 689 n. 14 (1973), quoting *Davis*.

this a logical and practical impossibility[16], but it was precisely the type of showing that *Lujan* has expressly declared unnecessary.

B. A Statutory Conferral of Standing Should be Respected

Section 402(b) of the Communications Act provides that appeals may be taken to the D.C. Circuit Court from decisions or orders of the Commission "[b]y any applicant for a construction permit or station license whose application is denied by the Commission" (Section 402(b)(1)), or by "any other person who is aggrieved ... by the Commission granting or denying any application specified in paragraph (1)..." Section 402(b)(6). Heretofore, without exception, Section 402(b) has been held to confer standing on FCC applicants to obtain judicial review in the D.C. Circuit of the denial of their own applications and the grant of their mutually exclusive competitors'. Congress conferred exclusive jurisdiction on that court to review these particular agency actions. In no other case in the 70 year history of the Federal Communications Act has the D.C. Circuit denied standing to an applicant to have judicial review of the FCC's disposition of its application. The D.C. Circuit's Decision therefore breaks entirely new and unprecedented ground by

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[16] The Ninth Circuit has sensibly held that a litigant cannot be expected to demonstrate its eligibility for standing by demonstrating its likelihood for success under criteria which have not yet been established. *Preston v. Heckler*, 734 F. 2d 1359, 1365-6 (9th Cir. 1984).

severely restricting the sole means of judicial review available to FCC applicants.[17]

The fact that Congress has conferred standing on FCC applicants to seek judicial review of adverse licensing decisions has been historically and consistently held to satisfy Article III standing requirements.

> [W]hen the [Supreme] Court determines that Congress intended the courts to intervene in a class of disputes at the behest of petitioners with particular interests, the Court holds that those petitioners have standing. In such cases, the Supreme Court does not deny standing based on application of a demanding test of causality or based on a judicial determination that the injury alleged is too "abstract" or "generalized."

Kenneth Culp Davis, Administrative Law Treatise, §§ 16.7 (3rd ed. 1994). Of course, a Congressional conferral of a right to sue cannot substitute for Article III standing, but the D.C. Circuit has without exception

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[17] The Court of Appeals' Decision here directly conflicts in this regard with its prior precedents in cases as venerable as *Orange Park Florida TV, Inc. v. FCC*, 811 F. 2d 664 (D.C. Cir. 1987) and as recent as *Free Air Corp.* v *FCC,* 130 F.3d 447, 448 (D.C. Cir. 1997). In neither of these case did the court require the challenging applicant to demonstrate that it would itself get the license on remand if it successfully showed that the original award was unlawful.

treated FCC applicants as so directly aggrieved by the denial of their own applications or the grant of their mutually exclusive competitors' as to easily justify judicial review, without any showing of likelihood of later success. See, *e.g.*, *Radio Television S.A. de C.V. v. FCC*, 130 F. 3d 1078 (D.C. Cir. 1997). ("The Communications Act grants standing before this Court to 'any . . . person [other than those enumerated in the statute] who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying' applications"); *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 893 F. 2d 1349 (D.C. Cir. 1990), modified *en banc* on other grounds, 931 F. 2d 73 (D.C. Cir. 1991). ("[S]tanding to challenge an order of the Commission is conferred by Section [402(b)(6)] of the Communications Act, which allows appeal to this Court by 'any person who is aggrieved or whose interests are adversely affected' by such order".)

In enacting Section 402(b), Congress made the determination that losing applicants for FCC licenses suffer an injury inflicted by the agency which should be subject to full appellate review. This Court has historically respected such Congressional determinations, so long as there is a genuine injury in fact sufficient to ensure the presence of a live controversy. *Federal Election Commission v. Akins*, 524 U.S. 11, 20 (1998). By imposing a new requirement that the losing applicant cannot challenge the lawfulness of the award to the winner unless it can prove that it would itself win on remand, the D.C. Circuit will inevitably permit unlawful license awards

to proceed unchallenged -- in direct contravention of Congressional intent.

C. Present Standing May Not Be Defeated by Projecting the Possibility of Uncertain Future Events

Under the present posture of the case, it is undisputed that Ranger and Miller are the only two applicants eligible for the licenses.[18] They filed their applications prior to the deadlines established by the FCC in 1988 and 1989. Under the FCC's "cut-off" rules, no other applications may be considered. Thus, if the unlawful award of the licenses in these four markets were reversed, one or the other of them would have a strong likelihood of not only competing for but actually winning the licenses at issue. Their grievance would therefore be fully redressed even under the D.C. Circuit's constrained view of that concept.

The D.C. Circuit reached its determination of non-redressability by guessing at what the FCC would do in the event of a remand. It acknowledged that the FCC had not "technically" abandoned the current rules governing the processing of the applications at bar (D.C. Circuit Opinion at p. 7, n. 4, Pet. App. at 7), nor had it adopted new rules erasing the original deadlines and admitting new applicants. The D.C. Circuit was nevertheless able to look into its crystal ball and conclude with "little doubt" that the FCC would adopt

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[19] As noted above, there could be a third applicant in the market where the FCC unlawfully awarded the license by lottery, but the interest of that applicant in the matter is unknown and in any case does not affect the analysis.

such rules. The court's clairvoyance was particularly acute because it was able to anticipate the outcome of a full notice and comment rulemaking proceeding which, we must assume, would not be a sham exercise with foregone outcomes. The court was able to divine that no comments would be filed persuading the FCC that it should use the procedure it recently used for long-pending broadcast applications (and which it has routinely used in all other instances where its licensing methodology changes) rather than the one it used in the Open Markets. It was able to foresee that, even though there are key differences in the circumstances of these markets from the Open Markets, the FCC would ignore those differences. It was able to intuit that even though the FCC is considering changes in its auction procedures which would enhance the chances of small businesses to win auctions, those changes would not be applied to this auction. Finally, it was able to forecast the cellular market so as to predict that there would be a large number of large telecommunications firms bidding for these licenses so that Ranger's and Miller's chances of winning against them would be small. *All* of these events would have to occur in the future as predicted in order for the basis for the court's redressability determination to be accurate. *None* of them is a certainty and some of them are highly unlikely.

Although this Court originally took the view that standing was determined at the time a lawsuit was

filed,[19] in recent years it has become clear that a litigant's present standing may be rendered moot by the occurrence of subsequent events. *Arizonians for Official English v. Arizona*, 520 U.S. 43, 68 n. 22 (1997). However, the subsequent event must actually occur for a litigant's standing to evaporate. Unless the subsequent event is certain to occur within the immediate time frame of the litigation (and perhaps not even then), the litigant's standing must be premised upon the actual factual and legal circumstances obtaining at the time the litigation is going on. See *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326 (1980). Any other rule of law requires a court to engage in the very sort of unsupported vaticination undertaken by the D.C. Circuit here. Prognosticating the future is hard enough for expert administrative agencies who have the benefit of a full record; for a court to attempt such a process on the basis of surmise and conjecture must inevitably result in error.

D. Standing May Not be Predicated on the Outcome of the Merits Determination

Under the D.C. Circuit's theory, Petitioners' standing depends on whether they prevail on the merits. If they lose on the merits, we would simply have had a garden-variety challenge by two losing applicants against the winning applicant. As long as Ranger and

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[20] *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537 (1824). (" It is quite clear that the jurisdiction of the Court depends upon the state of things at the time of the action, and that after vesting it cannot be ousted by subsequent events.")

Miller *lose* on the merits, the eventuality that might strip them of standing (*i.e.*, the opening up of the license to an auction with an unlimited number of new participants) will never have the chance to occur. Only if they are *successful* in demonstrating that the FCC's licensing actions were unlawful would the FCC have the opportunity to expand the field of applicants such that Petitioners would not have had standing to bring the appeal in the first place. Not only is this result absurd, but the Court would necessarily have to consider the merits of the case in order to resolve the standing issue. This Court has held that "standing in no way depends on the merits of the plaintiff's contending that particular conduct is illegal", *Warth v. Seldin*, 422 U.S. 490, 500 (1975), yet the D.C. Circuit's rule here produces exactly that result.

Warth also teaches that for standing purposes a complaint is to be construed in favor of the complaining party. (*Id.* at 501.) Yet here the D.C. Circuit construed the standing situation on the basis *least* favorable to the appellants. One can always conjure up a string of future possibilities which, if they came to pass, would moot the current case or controversy. But no litigant can be expected to prove that every possible future event adverse to its interests will *not* occur as a predicate to seeking judicial review of the actual circumstances now obtaining. Again, *Warth* has been turned on its head.

E. Denying Standing Leaves No One to Challenge Unlawful Licensing Activity

This Court has highly disfavored the use of standing as a bar to *all* judicial review of agency activity. In *FCC v. Sanders Brothers Radio Station*,

309 U.S. 470, 477 (1990), the Court granted standing to those economically injured by a licensing action "on the theory that such persons might be the only ones sufficiently interested to contest an FCC action." (*Office of Communication of the United Church of Christ v. FCC*, 359 F. 2d 994 (D. C. Cir. 1966). The D.C. Circuit has adopted a similar theory with respect to the standing of broadcast listeners to challenge license renewals: unless such listeners are accorded standing, no one else would be willing to address the problems posed by the FCC's licensing action. *UCC, supra.* The law abhors a legal vacuum where real injuries are being suffered but the victims cannot obtain judicial redress. As Blackstone put it, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded." *Commentaries*, Volume III, p. 23.

Here the D.C. Circuit's ruling has the anomalous effect of insulating unlawful FCC actions from any judicial review whatsoever. Under the court's reasoning, the persons most aggrieved by unlawful licensing action (mutually exclusive applicants) are barred from challenging that action in court unless they can somehow demonstrate that they would be likely to get the grant themselves on remand. This means that where, as here, FCC counsel simply suggests that the FCC will open up the licensing process to new filers if its original actions are found unlawful, no losing competitor could challenge an unlawful award. That suggestion immediately strips the wronged competing applicants of their right to review in the D.C. Circuit.

Because such a suggestion is not even an official agency action, the question of whether the agency could lawfully open up the licensing proceeding to new filers is not itself subject in any way to judicial review. Since any prospective new applicants would just be members of the public, *no one* could challenge the action. The result is that agency licensing actions which are grossly unlawful can be immunized from judicial review by manipulation of the law of standing. This cannot be what Congress intended or what the Constitution requires.

CONCLUSION

For the reasons set forth above, the D.C. Circuit's decision below creates an unprecedented and potentially dangerous barrier to review of administrative actions in federal courts. *Certiorari* should be granted to give effect to the intent of Congress that FCC licensing decisions be appealable, to accord with prior decisions of this Court, and to ensure that aggrieved parties are able to obtain judicial review of unlawful agency actions.

Respectfully submitted,

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April 2004

Petitioner's Appendix

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Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 15, 2003 Decided November 14, 2003

No. 02-1155

RANGER CELLULAR AND
MILLER COMMUNICATIONS, INC.,
APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE

COMMNET OF FLORIDA, LLC, ET AL.,
INTERVENORS

Appeal of an Order of the
Federal Communications Commission

Donald J. Evans argued the cause and filed the briefs for appellants.

Stanley R. Scheiner, Counsel, Federal Communications Commission, argued the cause for appellee. With him on the

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

brief were *Jane E. Mago*, General Counsel, and *Daniel Armstrong*, Associate General Counsel. *Pamela L. Smith*, Counsel, entered an appearance.

David J. Kaufman, *Philip L. Verveer*, *David M. Don*, *Michael F. Morrone*, *Timothy Feldhause*, *Michael Deuel Sullivan*, *L. Andrew Tollin*, *Craig E. Gilmore*, *William R. Layton*, and *Carol L. Tacker* were on the brief for intervenors Commnet of Florida, LLC, et al. *Richard L. Brown* entered an appearance.

Before: EDWARDS, RANDOLPH, and GARLAND, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: Ranger Cellular and Miller Communications, Inc. (Ranger/Miller) appeal from an order of the Federal Communications Commission (FCC) rejecting Ranger/Miller's challenge to four licenses issued by the FCC to provide cellular phone service in rural markets. We conclude that the appellants lack standing to challenge the validity of the licenses, and we therefore dismiss that challenge for want of jurisdiction. Although Ranger/Miller have standing to challenge the FCC's denial of their alternative demand for a refund of their filing fees, we affirm that denial because it was based on a reasonable reading of the agency's own regulation.

I

We have recently set forth some of the history of this litigation in a related case, *Ranger Cellular & Miller Communications, Inc. v. FCC*, 333 F.3d 255 (D.C. Cir. 2003) (*Ranger/Miller I*), and discuss only the necessary background here. Historically, the FCC first awarded cellular licenses using comparative hearings, and then, starting in 1984, also began awarding them by lottery. After 1986, the Commission employed lotteries exclusively. Appellants Ranger/Miller filed applications in 1988 and 1989 to participate in lotteries for cellular telephone licenses in eight Rural Service Area (RSA) markets, but lost each lottery in which they participated. The Commission awarded most of the licenses

to initial lottery winners, but by the mid-1990s the initial winners were disqualified in each of the eight RSAs. The FCC planned to hold relotteries to determine replacement winners, and, in the meantime, granted interim operating authority to cellular telephone licensees in adjacent areas to provide service. *See Ranger/Miller I*, 333 F.3d at 256–57; *In the Matter of Implementation of Competitive Bidding Rules to License Certain Rural Service Areas, Notice of Proposed Rule Making*, 16 FCC Rcd 4296, 4301, ¶ 9 & n.21 (2001) [hereinafter *Competitive Bidding Rules, NPRM*].

Before the FCC was able to award the permanent licenses, however, Congress enacted the Balanced Budget Act of 1997, Pub. L. No. 105–33, 111 Stat. 251, 258–60 (1997). With limited exceptions, the Balanced Budget Act amended the Communications Act by terminating the FCC's authority to "issue any license or permit using a system of random selection" after July 1, 1997, 47 U.S.C. § 309(i)(5)(a), and requiring it to use instead "a system of competitive bidding," *id.* § 309(j).[1] In April 1999, concluding that it was "without authority to process the pending mutually exclusive RSA applications pursuant to the rules and requirements" of the lottery system, the FCC dismissed without prejudice all pending applications for the cellular telephone licenses at issue in this case, including Ranger/Miller's. *In the Matter of Certain Cellular Rural Service Area Applications*, 14 FCC Rcd 4619, 4620, ¶ 5 (WTB 1999) (dismissing pending applications for six of the RSA markets); *In the Matter of Cellular Rural Service Area Applications in Markets Nos. 599A and 672A*, ¶ 1 (WTB April 29, 1999) (J.A. at 5) (dismissing pending applications for two of the RSA markets).

On January 31, 2001, the FCC proposed holding an auction open to all interested bidders at which it would award licenses for those RSAs for which licenses had not yet been awarded or designated. *Competitive Bidding Rules, NPRM*, 16 FCC

[1] The Omnibus Budget Reconciliation Act of 1993 had given the FCC the option of using lotteries or competitive bidding to assign licenses for which applications were on file before July 26, 1993. Pub. L. No. 103–66, § 6002(a), 107 Stat. 312, 387 (1993).

Rcd at 4297, ¶ 1. By that time, there were only four such RSAs. *Id.*[2] Ranger/Miller opposed that proposal, contending that both a provision of the Balanced Budget Act and principles of equity required the FCC to limit the pool of bidders to those that had filed applications prior to July 1, 1997. The Commission rejected those contentions and implemented its open auction proposal. *In the Matter of Implementation of Competitive Bidding Rules to License Certain Rural Service Areas, Report and Order*, 17 FCC Rcd 1960, 1961, ¶ 1, 1969, ¶ 16 (2002) [hereinafter *Competitive Bidding Rules, Report and Order*]. Although eligible to do so, Ranger/Miller did not participate in the auctions. On June 4, 2002, the FCC completed the auctions, and thereafter Ranger/Miller petitioned this court for review. On July 1, 2003, we rejected Ranger/Miller's arguments and denied their petition. *Ranger/Miller I*, 333 F.3d at 262.

In the present action, Ranger/Miller challenge the validity of the remaining four of the eight RSA licenses for which they originally applied. Three of those licensees won their respective lotteries in 1989 and 1990, but were disqualified in 1992 because their percentage of foreign ownership exceeded the then-applicable statutory limits. *In re Applications of Cellwave Telephone Services L.P., FutureWave General Partners L.P., and Great Western Cellular Partners*, 7 FCC Rcd 5955 (1992); 47 U.S.C. §§ 310(b)(1), (3). This circuit upheld those dismissals. *Great W. Cellular Partners v. FCC*, 1995 WL 761842 (D.C. Cir. 1995); *Cellwave Tel. Services L.P. v. FCC*, 30 F.3d 1533 (D.C. Cir. 1994). In December 2000, however, Congress passed the Launching Our Communities' Access to Local Television Act of 2000 (Local Television Act), which directed the FCC to reinstate the three dismissed applicants. *See* District of Columbia Appropriations Act of FY 2001, Pub. L. No. 106–553, § 1007, 114 Stat. 2762 (2000). Pursuant to the Local Television Act, the FCC awarded those licenses to the congressional designees in March 2001. In an

[2] As discussed below, by 2001 three of the original eight RSAs had been designated by Congress, and one had been awarded by the FCC.

application to the FCC, Ranger/Miller challenged those awards on the ground that, in directing the reinstatements, the Local Television Act violated the constitutional separation of powers by overruling the final judgment of this court.

Ranger/Miller also submitted a petition for reconsideration to the FCC's Wireless Telecommunications Bureau (Wireless Bureau), challenging a fourth license that the FCC issued to Zephyr Tele–Link in 2000. Following the disqualification of an initial lottery winner, Zephyr's application had been selected in an April 1992 relottery. Its license had not yet been issued, however, when the Balanced Budget Act was passed in 1997, and Zephyr's was among the pending applications that the FCC dismissed in 1999. In 2000, the FCC reinstated Zephyr's application and awarded it a license. *In the Matter of Zephyr Tele–Link*, 15 FCC Rcd 4247 (WTB 2000). Ranger/Miller argued that the award to Zephyr conflicted with the provision of the Balanced Budget Act that barred the issuance of licenses using lotteries after July 1, 1997. *See* 47 U.S.C. § 309(i)(5)(A). Finally, Ranger/Miller also sought reconsideration of the Wireless Bureau's rejection of their request, in the alternative, for a refund of their initial filing fees in the event that their other challenges were denied.

On May 9, 2002, the FCC rejected Ranger/Miller's challenges to the award of the four licenses. *In the Matter of Certain Cellular Rural Service Area Applications, Opinion and Order*, 17 FCC Rcd 8508 (2002) [hereinafter *2002 Opinion and Order*]. The Commission found that the Local Television Act required it to reinstate the three congressional designees and that it lacked the power to declare an act of Congress unconstitutional. *Id.* at 8517–18, ¶ 15. The Commission also concluded that, although the Balanced Budget Act barred it from conducting new lotteries after July 1, 1997, the Act did not bar the FCC from processing Zephyr's application by using the results of a lottery that had taken place prior to that date. *Id.* at 8513, ¶ 8. The Commission did not address Ranger/Miller's alternative request for a refund of filing fees, leaving the Wireless Bureau's rejection in place.

Ranger/Miller now appeal both the denial of their challenges to the four licenses and the denial of their request for a refund.

II

The FCC advances a threshold objection to Ranger/Miller's challenge to the four licenses, asserting that the appellants lack standing to raise such a claim. As the Supreme Court has explained, the "irreducible constitutional minimum" requirements of standing are:

> (1) that the plaintiff have suffered an "injury in fact" — an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of — the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167 (1997); *accord Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The question here is whether Ranger/Miller satisfy the third, "redressability" prong. We conclude that they do not.

Ranger/Miller contend that their injury would be redressed by vacating the award of the four challenged licenses because, if the licenses were withdrawn, Ranger/Miller would have a reasonable chance of obtaining them. The appellants concede that, if the awards were vacated, the Balanced Budget Act would require the FCC to reassign the licenses via auction. Reply Br. at 6.[3] But they contend that such an auction would

[3] In addition, the Local Television Act independently provides that, if the FCC finds that one of the three congressional designees is otherwise ineligible, "the Commission shall grant the license . . . by competitive bidding pursuant to" 47 U.S.C. § 309(j). Local Television Act, § 1007(b)(5).

have to be "closed" — that is, limited to bidders "from the original pool" that applied for the lotteries in 1988 and 1989. *Id.* at 5–6. And because the remaining members of that original pool are a small number of small companies like Ranger/Miller, the appellants believe they would have a reasonable chance of submitting winning bids. *Id.* at 5.

The flaw in this argument is that the consequence of a Ranger/Miller victory on this appeal would not be an auction limited to the original applicants, but rather an open auction in which virtually any interested company would be permitted to compete. In 2002, the FCC determined that "all entities" should be permitted to participate in an auction for cellular telephone service in RSA markets. *Competitive Bidding Rules, Report and Order*, 17 FCC Rcd at 1966, ¶ 10.[4] As we noted above, this court recently affirmed that decision in a separate appeal. In *Ranger/Miller I*, we rejected Ranger/Miller's contention that another provision of the Balanced Budget Act, 47 U.S.C. § 309(*l*), required the FCC to restrict the pool of bidders to the original applicants. *Ranger/Miller I*, 333 F.3d at 258–60. And we likewise rejected Ranger/Miller's claim that the Commission had acted unreasonably in opting to permit bidding by new applicants. In particular, we rejected the appellants' contention that the Commission had

[4] Although the 2002 decision technically applied to only the four cellular RSA markets disputed in *Ranger/Miller I*, there is little doubt that the FCC would follow that recent precedent were Ranger/Miller to win this appeal and overturn the four licenses they have challenged here. The 2002 decision applied to the only RSA markets that remained unlicensed or undesignated at the time. *Competitive Bidding Rules, Report and Order*, 17 FCC Rcd at 1961, ¶ 1 & n.2. Those markets were available because "the initial lottery winner was disqualified or ha[d] otherwise withdrawn its application," *id.* at 1961, ¶ 1, the same situation that would prevail were we to uphold Ranger/Miller's appeal. Moreover, in the order under review here, the FCC rejected Ranger/Miller's argument that future auctions should be limited to the original applicant pool, *2002 Opinion and Order*, 17 FCC Rcd at 8514, ¶ 10, thus confirming the Commission's intention to award through open auctions all RSA licenses that become available.

failed to take appropriate account of equitable considerations in deciding to open the auction pool. *Id.* at 260–61.

The appellants offer two reasons why *Ranger/Miller I*'s affirmance of the FCC's open auction policy should not apply in the event the four licenses at issue here are vacated. Neither survives even facial examination. First, appellants suggest that *Ranger/Miller I* was wrongly decided, and that this panel therefore should not follow it. But follow it we must. Once a panel of this court has decided a matter, subsequent panels are bound by that decision unless and until it is changed by the court en banc. *See, e.g., People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1244 (D.C. Cir. 2003) (citing *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc)). Second, at oral argument, counsel for Ranger/Miller suggested that *Ranger/Miller I* should be distinguished from the instant case on the ground that the equitable arguments favoring closed auctions in the four markets at issue here are different from the equitable arguments applicable to the markets considered in *Ranger/Miller I*. But, as the FCC's order points out, Ranger/Miller's petition before the Commission raised the same arguments for all eight licenses, *2002 Opinion and Order*, 17 FCC Rcd at 8514, ¶ 10, and on appeal Ranger/Miller have offered no reason to distinguish between the equitable considerations surrounding the licenses contested here and those implicated in *Ranger/Miller I*.

As we have noted above, to satisfy the third prong of constitutional standing, Ranger/Miller's injuries must be redressable by a judicial decision. In the open auction that FCC policy dictates would follow a Ranger/Miller victory, the appellants would face not a small number of small companies, but rather a large number of large telecommunications firms with the capacity to pay large sums for the RSA licenses. And as the appellants candidly admit: "The chances of Ranger/Miller outbidding those giants are virtually nil.... By opening the auction, the FCC as a practical matter made it impossible for the original applicants to compete." Reply Br. at 5. That concession makes it clear that Ranger/Miller's alleged injuries cannot be redressed by this court. While it is

true that "a plaintiff suffers a constitutionally cognizable injury by the loss of an *opportunity to pursue a benefit* . . . even though the plaintiff may not be able to show that it was *certain to receive* that benefit had it been accorded the lost opportunity," a plaintiff's injury is neither cognizable nor redressable when such an opportunity is entirely "illusory." *CC Distributors, Inc. v. United States*, 883 F.2d 146, 150–51 (D.C. Cir. 1989) (emphasis in original). In *CC Distributors*, we found that the lost opportunity to compete was not illusory because the plaintiffs had demonstrated their "capacity to compete for and to obtain [the] contract[ ]." *Id.* at 151. The appellants here, however, concededly have no such capacity, and we "cannot find a basis for standing if there is no realistic possibility of those competing for a position to receive it once the supposed illegality is corrected." *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 56 (D.C. Cir. 1991). Because it is "merely speculative" that Ranger/Miller's "injury will be redressed by a favorable decision," *Bennett*, 520 U.S. at 167, they lack standing to prosecute their challenge to the four RSA licenses.[5]

III

The remaining question is whether Ranger/Miller are entitled to refunds of their application filing fees. Since a victory on that issue would bring them a small monetary reimbursement (the filing fee was $200.00 per application), there is no doubt that Ranger/Miller have standing to pursue their refund claim. The FCC does, however, raise a different threshold objection.

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[5] In a section of their brief that repeats arguments they made in *Ranger/Miller I*, the appellants also contend that the FCC should not have dismissed their then-pending cellular applications in April 1999. Appellants' Br. at 16–35. We are uncertain whether the appellants mean to continue to press this argument in light of the disposition of *Ranger/Miller I* — which was announced after the brief in the instant case was filed — but if they do, our conclusion that Ranger/Miller lack standing to challenge the licenses applies equally to their challenge to the dismissals.

The FCC contends that our consideration of Ranger/Miller's refund claim is barred by § 405 of the Communications Act, which requires that the Commission be afforded an "opportunity to pass" on an issue as "a condition precedent to judicial review." 47 U.S.C. § 405(a). It asserts that the Commission did not have an opportunity to pass on the refund issue, because Ranger/Miller did not present the argument in briefs filed with the Commission itself, but rather mentioned it only in a footnote to their Petition for Reconsideration to the Wireless Bureau — a note that referenced Ranger/Miller's earlier filing on the subject.[6] This case, the FCC argues, is thus controlled by *Bartholdi Cable Co. v. FCC*, in which we held that a litigant cannot preserve an issue for judicial review merely by raising it before an FCC bureau, and that a footnote in an application to the Commission that does nothing more than incorporate all claims previously made before the bureau is likewise insufficient. 114 F.3d 274, 279–80 (D.C. Cir. 1997).

The FCC's reliance on *Bartholdi* is flawed for two reasons. First, its contention that the refund issue was never before the Commission itself is simply incorrect. It is true that Ranger/Miller did not present this issue — or any issue — in briefs filed directly with the Commission. But that was only because the Commission chose to reach down into the Wireless Bureau and decide the case based on Ranger/Miller's petition for reconsideration to that bureau. *See* Appellees' Br. at 35 n.30; Reply Br. at 18–19. And as the FCC order under review makes clear, there is no question that the Commission had that petition before it when it decided this case. *See 2002 Opinion and Order*, 17 FCC Rcd at 8508, ¶ 1 & n.1 (stating that the Commission "has before it . . . [the] petition for reconsideration filed by Ranger Cellular and Miller Communications").

[6] The footnote stated: "Petitioners continue to contend that, if their applications were correctly dismissed by the Bureau, a refund of their filing fee is due. However, we have nothing to add to our original presentation on this point." Pet. for Recons. at 20 n.12 (J.A. at 67).

Second, unlike the situation in *Bartholdi*, both Ranger/Miller's footnote and the filing that it referenced were in submissions made to the same decisionmaker.[7] In *Bartholdi*, the footnote was in a brief filed with the Commission, while the arguments to which it referred were in papers filed with a bureau. By contrast, in this case the footnote was in a petition to the Wireless Bureau and its reference to "our original presentation," Pet. for Recons. at n.12 (J.A. at 67), was to a filing previously made with that same bureau — a filing that addressed the refund claim in detail. *See* Consol. Pet. for Recons. at 4–6 (J.A. at 42–44). Ranger/Miller thus had every reason to expect that the relevant decisionmaker, which it thought would be the Wireless Bureau, would be familiar with those arguments without the need to repeat them. And because the Commission chose to decide the case based on the filings made with the Bureau, those filings gave it a fair opportunity to pass on Ranger/Miller's claim for a refund.

As there is no bar to our consideration of the appellants' claim for a refund of their application fees, we turn to the merits of that claim. Ranger/Miller's argument rests on FCC Rule 1.1113, which states as follows:

> The full amount of any fee submitted will be returned or refunded, as appropriate....
>
> (4) When the Commission adopts new rules that *nullify* applications already accepted for filing, or [a] new law or treaty would render useless a grant or other positive disposition of the application.

47 C.F.R. § 1.1113 (emphasis added). Ranger/Miller insist that the new open auction rules adopted by the Commission in the wake of the Balanced Budget and Local Television Acts effectively "nullif[ied]" the lottery applications they filed in

[7] We therefore need not decide whether Ranger/Miller's terse footnote — which, in contrast to the note in *Bartholdi*, clearly specified the point at issue, *see supra* note 6 — would have been sufficient to preserve the refund claim had it been part of the only brief that Ranger/Miller filed with the expected decisionmaker.

1988 and 1989, thus triggering Rule 1.1113's right to a fee refund.

The FCC replies that the new rules did not nullify Ranger/Miller's applications within the meaning of Rule 1.1113, because the appellants got what they paid for: the right to participate in lotteries for eight cellular licenses. There is no dispute that Ranger/Miller did participate in those lotteries, although they lost them all. In the FCC's view, the fact that, under the new rules, Ranger/Miller's original applications did not give them the further right to a closed auction when the original lottery winners were disqualified, does not constitute "nullification" of those original applications. As the Wireless Bureau explained:

> [P]etitioners were not entitled to a refund of their filing fees because they had actually participated in the initial lotteries for their respective markets, thus affording them a full opportunity to be selected.... The fact that second lotteries were held prior to the passage of the Balanced Budget Act of 1997 for certain markets in which the initial tentative selectee was subsequently disqualified does not create a vested right in applicants that second lotteries would be held for such markets nor mandate the refund of fees under section 1.1113(a)(4).

In the Matter of Certain Cellular Rural Service Area Applications, Order, 16 FCC Rcd 4860, 4863–64, ¶ 7 (WTB 2001).

Reviewing courts must "defer to an agency's reading of its own regulations unless that reading is 'plainly erroneous or inconsistent with the regulation[s].' " *Global Crossing Telecommunications, Inc. v. FCC*, 259 F.3d 740, 746 (D.C. Cir. 2001) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). In light of the agency rationale described above, there is nothing plainly erroneous or inconsistent about the FCC's conclusion that Ranger/Miller's original applications were not nullified within the meaning of Rule 1.1113. Indeed, had Ranger/Miller won the lotteries to which those applications gave them admission, they would have received their licenses long before the Balanced Budget Act and Local Television Act were enacted, and the new rules would have had no impact on them

at all. Accordingly, we affirm the FCC's denial of Ranger/Miller's request for refunds.

IV

Concluding that Ranger/Miller lack standing to challenge the award of four cellular telephone licenses, we dismiss that aspect of their appeal for want of jurisdiction. While there is no similar bar to our consideration of the appellants' challenge to the denial of their alternative request for a refund of filing fees, we conclude that the FCC reasonably interpreted its own rules in denying that request.

Dismissed in part and affirmed in part.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 02-1155 September Tern, 2003

Filed on: Jan 28, 2004

Ranger Cellular and
Miller Communications, Inc.,
Appellants

v.

Federal Communications Commission,
Appellee

Commnet of Florida, LLC, et al.,
Intervenors

BEFORE: Edwards, Randolph and Garland,
Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed December 29, 2003, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By /S/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 02-1155 September Term, 2003

Filed on: Jan 28, 2004

Ranger Cellular and
Miller Communications, Inc.,
Appellants

v.

Federal Communications Commission,
Appellee

Commnet of Florida, LLC, et al.,
Intervenors

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson*, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By /S/
Michael C. McGrail
Deputy Clerk

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Certain Cellular Rural	)	Fee Nos. 9179072, et al.
Service Area	)	Fee Nos. 9187479, et al.
Applications	)	
	)	
Certain Cellular Rural	)	Fee Nos. 9177648, et al.
Service Area	)	
Applications in Market	)	
Nos. 599A and 672A	)	
	)	
Applications of Great	)	File No. 10269CLP88
Western Cellular	)	File No. 10625CLP89
Partners, L.L.C.,	)	File No. 10810CLP89
Monroe Telephone	)	
Services, L.L.C., and	)	
FutureWave Partners,	)	
L.L.C.	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 29, 2002 **Released:** May 9, 2002

By the Commission:

I. INTRODUCTION

• The Commission has before it an application for review filed by Hightower Communications, Inc. (Hightower) and a petition for reconsideration filed by Ranger Cellular and Miller Communications, Inc. (collectively, Ranger/Miller), both of which challenge the dismissal by the Wireless Telecommunications Bureau (Bureau) of their cellular lottery applications in eight rural service area (RSA) markets.[1] Also

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[1] *See* Application for Review, filed April 2, 2001, by Hightower (Hightower Application); Petition for Reconsideration, filed April 2, 2001, by Ranger/Miller (Ranger/Miller Petition). The RSA markets are: 332A - Polk, Arkansas; 370A - Monroe, Florida; 492A - Goodhue, Minnesota; 582A - Barnes, North Dakota; 599A - Nowata, Oklahoma; 615A - Bradford, Pennsylvania; 672A - Chambers, Texas; and 727A - Ceiba, Puerto Rico. Hightower does not seek review of the Bureau's dismissal of all pending applications for RSA No. 599A - Nowata, Oklahoma.

On April 25, 2002, Hightower filed a pleading captioned "Amendment to Application for Review" (Amendment). Section 1.115(d) requires that an "application for review and any supplemental thereto shall be filed within 30 days of public notice of [the] action . . ." 47 C.F.R. § 1.115(d). The order, DA 01-544, that is the subject of both Hightower's Application for Review and its Amendment was released on March 2, 2001. Accordingly, any application for review of that order was due within 30 days of March 2, 2001, or April 2, 2001. *See* 47 C.F.R. 1.4(b)(2) (the release date is the public notice date for non-rulemaking documents). Hightower did not

before the Commission is a separate application for review filed by Ranger/Miller challenging the Bureau's subsequent award of cellular licenses to other applicants in three of the eight RSA markets pursuant to legislation passed by Congress.[2] For the reasons stated below, we deny both applications for review and the petition for reconsideration.

II. BACKGROUND

2. In 1984, the Commission adopted rules to award cellular licenses by lottery.[3] By 1991, the Commission had held lotteries for all of the cellular RSA markets, and licenses were awarded to the lottery winners in most instances. In the RSA markets at issue here, however, the initial lottery winner was disqualified from receiving the license because of a successful petition to deny or other Commission action,

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seek leave to file its Amendment, which is more than one-year delinquent, nor did it request waiver of the section 1.115(d) 30-day filing requirement. Accordingly, we dismiss the Amendment, and its contents shall not be considered part of the record in this proceeding. We note, however, that nothing in the amendment alters the conclusions reached in this Memorandum Opinion and Order.

[2] *See* Application for Review, filed November 1, 2001, by Ranger/Miller (Ranger/Miller Application).

[3] Amendment of the Commission's Rules to Allow the Selection from Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, *Report and Order*, 98 F.C.C.2d 175 (1984) (subsequent history omitted).

and the license was not awarded to those initial lottery winners.

3. Under these circumstances, our former cellular lottery policy provided that after the application of the tentative selectee was denied, a second lottery would be held among the remaining applicants or, in cases where multiple rank-ordered applicants were selected in the first lottery, the next ranked applicant would become the tentative selectee.[4] Accordingly, in 1992, the Commission conducted a second lottery in two of the markets at issue (RSA No. 599A - Nowata, Oklahoma, and RSA No. 672A - Chambers, Texas),[5] and in July 1996, the Commission

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[4] Former rule section 1.823(a) provided, in pertinent part, that "[t]he random selection shall pick a tentative selectee and then repeat the random selection process with the remaining applicants, so that, in the event that the tentative selectee's application is denied, the other applicants will be ranked in order as alternative selectees." 47 C.F.R. § 1.823(a) (1987). The foregoing provision was removed in May 1988 and replaced by a provision which authorized the Common Carrier Bureau Chief to designate the number of additional applicants, if any, to be selected as rank-ordered tentative selectees on a case-by-case basis. *See* former rule section 1.823(a), 47 C.F.R. § 1.823(a) (1989).

[5] *Public Notice*, "FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which Previous Winner Was Defective," Mimeo No. 21449 (Jan. 29, 1992) (multiple RSA markets); In Re Application Of Progressive Cellular III B-3 for Facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 599, Oklahoma

scheduled a second lottery for the six remaining markets.[6] On September 9, 1996, however, Cellular Communications of Puerto Rico (CCPR) filed a petition requesting that the Commission use auctions rather than a lottery to award the six licenses scheduled for the 1996 lottery.[7] To preserve the issue raised in CCPR's petition, the Bureau postponed the lottery until further notice.[8]

4. On August 5, 1997, the Balanced Budget Act of 1997 was signed into law.[9] Section 3002(a)(2)(B) of this legislation, codified in Section 309(i)(5) of the Communications Act, terminated the Commission's authority to use lotteries to select among mutually exclusive applications for initial licenses or construction permits after July 1, 1997, except for licenses for noncommercial educational and public broadcast

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4—Nowata, *Memorandum Opinion and Order*, 7 FCC Rcd 2080 (CCB, MSD 1992) (denying petition to stay relottery of RSA No. 599).

6 *Public Notice*, "FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which the Previous Winner Was Defective," Mimeo No. 63896 (July 12, 1996) (RSA Market Nos. 332A, 370A, 492A, 582A, 615A and 727A).

7 Cellular Communications of Puerto Rico, Inc. Petition for Declaratory Ruling, Or, in the Alternative, for Rulemaking, RM-8897 (filed Sept. 9, 1996).

8 *Public Notice*, "Wireless Telecommunications Bureau Postpones Cellular Telecommunications Service Lottery for Rural Service Areas," Mimeo No. 65051 (Sept. 10, 1996).

9 Pub. L. No. 105-33, § 3002(a), 111 Stat. 251, 258-60 (1997) (amending 47 U.S.C. § 309(j)) (1997 Budget Act).

stations.[10] Pursuant to this provision, in April 1999, the Bureau dismissed all pending cellular lottery applications for the RSA markets at issue in this proceeding.[11] Several lottery applicants, including Hightower and Ranger/Miller, sought reconsideration of the Bureau's decision. Subsequently, the Bureau reinstated the applications of the tentative selectees in RSA No. 599A - Nowata, Oklahoma and RSA No. 672A - Chambers, Texas, the two markets in which a second lottery had been

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[10] In the Omnibus Budget Reconciliation Act of 1993, Congress added Section 309(j) to the Communications Act, authorizing the Commission to resolve mutually exclusive applications for use of the electromagnetic spectrum by auction. Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387-92 (1993) (1993 Budget Act). Section 6002(e) of the 1993 Budget Act prohibited the FCC from "issu[ing] any license or permit [by lottery] after the date of enactment of this Act unless . . . one or more applications for such license were accepted for filing by the Commission before July 26, 1993." *Id.*, § 6002(e). This provision afforded the Commission discretion whether to use auctions or lotteries for applications filed *before* July 26, 1993.

[11] *See* In the Matter of Certain Cellular Rural Service Area Applications, *Order*, 14 FCC Rcd 4619 (WTB 1999) (dismissing all pending applications in RSA Market Nos. 332A, 370A, 492A, 582A, 615A, and 727A); In the Matter of Certain Cellular Rural Service Area Applications in Markets 599A and 672A, *Order*, DA 99-814 (WTB, CWD rel. April 29, 1999) (*Dismissal Order II*) (dismissing all pending applications in RSA Market Nos. 599A and 672A).

held in 1992.[12] In RSA No. 599A, the tentative selectee, Zephyr Tele-Link (Zephyr), was awarded the license.[13] In RSA No. 672A, the application of the tentative selectee, Alee Cellular Communications (Alee), was dismissed for lack of character qualification based on a prior disqualification in another cellular application proceeding.[14] With respect to all other cellular lottery

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[12] *See* In the Matter of Rural Cellular Service Applications in Market Nos. 599A and 672A, *Order on Reconsideration*, DA 99-1426, 1999 WESTLAW 511242 (FEDCOM-FCC) (WTB rel. July 21, 1999).

[13] In the Matter of Zephyr Tele-Link Application for a Construction Permit to Establish a Cellular System Operating on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service To Serve the Oklahoma 4 - Nowata Rural Service Area, Market No. 599A, *Order*, 15 FCC Rcd 4247 (WTB, CWD 2000) (*Zephyr Order*).

[14] *See* In the Matter of Application of Alee Cellular Communications for Authorization to Construct Nonwireline Cellular System in Texas RSA 21 Market 672, *Memorandum Opinion and Order*, 15 FCC Rcd 2831 (WTB, CWD 2000). On reconsideration, we recently reinstated the application and designated the matter for hearing on the issue of whether Alee's prior disqualification in the New Mexico RSA 3 Market 55A also disqualifies it for the Texas 21 license. In the Matter of Application of Alee Cellular Communications for Authorization to Construct Nonwireline Cellular System in Texas RSA 21 Market 672A, *Memorandum Opinion and Order, Hearing Designation Order and Notice of Opportunity for Hearing*, FCC 02-36, 2002 WESTLAW 252755 (FEDCOM-FCC) (rel. Feb. 22, 2002).

applicants, the Bureau issued an order in March 2001 denying the outstanding petitions for reconsideration and upholding prior dismissal of all pending lottery applications.[15] Hightower and Ranger/Miller now seek review of the Bureau's reconsideration decision.

5. On December 31, 2000, Congress enacted the Launching Our Communities' Access to Local Television Act of 2000 (2000 Act).[16] Section 1007 of the 2000 Act directed the Commission to reinstate and process the applications of the original lottery winners in three of the eight RSA markets, No. 370A - Monroe, Florida, No. 492A - Goodhue, Minnesota, and No. 615A - Bradford, Pennsylvania (collectively, the "2000 Act Markets").[17] The three applicants, Monroe Telephone Services, L.L.C., Great Western Cellular Partners, L.L.C., and FutureWave Partners, L.L.C. (collectively, the "2000 Act Applicants"), won their respective lotteries in 1989 and 1990, but were disqualified by the Commission in 1992 because their foreign ownership exceeded the then-applicable statutory and regulatory limits.[18] Pursuant to the statutory directive,

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[15] In the Matter of Certain Cellular Rural Service Area Applications, *Order*, 16 FCC Rcd 4860 (WTB 2001) (*Bureau RSA Dismissal Order*).

[16] District of Columbia Appropriations Act of FY 2001, Pub. L. No. 106-553, 114 Stat. 2762 (2000), Title X.

[17] *Id.*, § 1007(a)(1).

[18] In re Applications of Cellwave Telephone Services L.P., FutureWave General Partners L.P., and Great Western Cellular Partners, *Memorandum Opinion and Order*, 7 FCC Rcd 5955 (1992), *recon. by Great Western denied*, Great

the 2000 Act Applicants filed amended applications for their respective markets on February 9, 2001. On March 16, 2001, the Commercial Wireless Division (Division) found each applicant "technically, financially, and otherwise qualified to be a Commission licensee," and awarded the licenses for the 2000 Act Markets.[19] Ranger/Miller sought reconsideration of that decision, which the Division denied in October 2001.[20] Ranger/Miller seek review of the Division's reconsideration order in their application for review.[21]

6. On January 31, 2001, the Commission, acting pursuant to the 1997 Budget Act, released a *Notice of*

Western Cellular Partners, *Memorandum Opinion and Order*, 8 FCC Rcd 3222 (1993). The D.C. Circuit upheld dismissal of these applications. *See Cellwave Tel. Servs. L.P. v FCC*, 30 F.3d 1533 (1994); *Great Western Cellular Partners v. FCC*, 72 F.3d 919 (D.C. Cir. 1995) (per curium) (unpublished table disposition).

[19] *Public Notice*, "Wireless Telecommunications Bureau Grants Rural Cellular Licenses," 16 FCC Rcd 5601 (WTB, CWD rel. Mar. 16, 2001).

[20] In the Matter of Applications of Great Western Cellular Partners, L.L.C., Monroe Telephone Services, L.L.C., and FutureWave Partners, L.L.C., *Memorandum Opinion and Order*, 16 FCC Rcd 18,767 (WTB, CWD rel. Oct. 19, 2001) (*Great Western Order*).

[21] Great Western, Monroe, and FutureWave filed an Opposition to the Ranger/Miller Application on November 16, 2001. Ranger/Miller filed a Reply on November 28, 2001.

Proposed Rulemaking proposing auction rules for the four remaining RSA markets other than the 2000 Act Markets and the market awarded to Zephyr.[22] In the *RSA Auction Report and Order,* released on January 28, 2002, the Commission adopted rules to auction these licenses.[23] The rules provide that all eligible entities, including the original lottery applicants for these markets, may participate in the auction.[24]

III. DISCUSSION

A. Ranger/Miller Petition for Reconsideration

7. We first address the Ranger/Miller Petition for Reconsideration, which challenges the Bureau's decision to dismiss pending lottery applications in the eight markets at issue. Ranger/Miller argue that in those markets in which the Bureau dismissed all lottery applications and subsequently reinstated a tentative

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[22] Implementation of Competitive Bidding Rules to License Certain Rural Service Areas, *Notice of Proposed Rulemaking*, Docket No. 01-32, 16 FCC Rcd 4296 (2001).

[23] Implementation of Competitive Bidding Rules to License Certain Rural Service Areas, *Report and Order*, Docket No. 01-32, FCC 02-9, 2002 WESTLAW 100245 (FEDCOM-FCC) (rel. Jan. 28, 2002) (*RSA Auction Report and Order*), *pet. for review pending*, Ranger Cellular, et al. v. FCC, No. 02-1093 (D.C. Cir., filed Mar. 18, 2002).

[24] *Id.* at ¶10.

selectee (*i.e.*, the three 2000 Act Markets and RSA Nos. 599A and 672A), it should have reinstated all of the dismissed pending applications as well.[25] We concur with the Bureau's determination, in the order below, that reinstatement of the 2000 Act Applicants did not require the reinstatement of all competing lottery applications in these three markets.[26] First, the 2000 Act required reinstatement of only the 2000 Act Applicants.[27] Second, if any of the 2000 Act Applicants were found ineligible after amending their applications, the 2000 Act directed the Commission to auction the affected license.[28] Moreover, because the 1997 Budget Act terminated the Commission's authority to use lotteries to select among mutually exclusive applications for initial licenses after July 1, 1997, the Commission was precluded from conducting a second lottery among the original lottery applicants for these markets. Under these circumstances, reinstatement of competing lottery applications in the 2000 Act Markets would have served no purpose. We also reject Ranger/Miller's claim that the Bureau's reinstatement of the 2000 Act Applicants' applications without concurrent reinstatement of the other lottery applications demonstrates that the Bureau "pre-judged" the merits of the reinstated applications.[29] We find that

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25 Ranger/Miller Petition at 16-17.

26 *See Great Western Order*, 16 FCC Rcd at 18769 ¶ 7.

27 *Id.* at n.12 (citing 2000 Act, § 1007(a)).

28 2000 Act at § 1007(B)(5).

29 Ranger/Miller Petition at 16.

the Bureau objectively reviewed and approved the technical, financial and other qualifications of each of the 2000 Act Applicants, none of which are challenged by Ranger/Miller.

8. We similarly reject Ranger/Miller's contention that the Bureau should have reinstated all pending applications for RSA No. 599A – Nowata, Oklahoma, the market awarded to Zephyr Tele-Link.[30] In this market, after initially dismissing pending applications,[31] the Bureau determined that it had overlooked the fact that a second lottery had been held for this market in 1992, in which Zephyr was the tentative selectee.[32] Accordingly, the Bureau reinstated and ultimately granted Zephyr's application. Ranger/Miller argue that the award of the license to Zephyr violates Section 309(i)(5) of the Act, which prohibits the use of lotteries to award licenses after

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[30] *Id.* at 17-18. We note that Ranger/Miller did not seek reconsideration of the order granting Zephyr's application for RSA No. 599A, and that its raising of issues concerning that market in this proceeding amounts to little more than a late-filed petition for reconsideration of the order granting the authorization. Ranger/Miller have offered no justification for the Commission to consider these late-filed arguments, other than its claim that it was "unfortunately unaware" of the license grant. *Id.* at 18. Although we exercise our discretion to address Ranger/Miller's arguments concerning RSA No. 599A, we find the timing of this challenge to provide separate grounds for dismissal of this portion of Ranger/Miller's petition.

[31] *See Dismissal Order II*, *supra* n.11.

[32] *See Zephyr Order*, *supra* n.13.

July 1, 1997. This misconstrues the effect of the statute on the Commission's licensing authority: Section 309(i)(5) only prevents the Commission from conducting new lotteries after July 1, 1997 (with limited exceptions not applicable here), it does not prohibit the Commission from processing an application based on the results of a lottery that occurred prior to that date.[33]

9. Finally, Ranger/Miller contend that reinstatement of all pending applications in the three 2000 Act Markets and RSA Nos. 599A and 672A is required by the D.C. Circuit's opinions in *Bachow Communications v. FCC* and *McElroy Electronics v. FCC*.[34] *Bachow* holds that where the FCC replaces an obsolete license processing system with another system, the FCC is not obliged to process all pending applications just because applicants that would have been cut-off by the old system can apply under the new system.[35] *McElroy* stands for the proposition that when the Commission decides to process timely-filed applications, it may not also process

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[33] Ranger/Miller's argument is equally inapposite with respect to RSA No. 672A, although the application of the tentative selectee in that case, Alee Communications, was not granted and is currently designated for hearing. *See* n.14, *supra*.

[34] Ranger/Miller Petition at 16 (*citing Bachow Communications, Inc., et al. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001); *McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996)).

[35] *Bachow*, 237 F.3d at 687.

competing applications that were filed out of time.[36] The *Bachow* and *McElroy* holdings have no relevance to the circumstances presented here, because the Commission did not process any applications that were filed out of time, but merely reinstated the timely-filed applications of prior lottery winners.

10. Ranger/Miller also argue that the Bureau erred in dismissing pending applications in the four RSA markets that remain subject to future auction, on the grounds that only the original pool of lottery applicants should be eligible to participate in such auctions. Ranger/Miller argue that: (1) limiting participation in RSA auctions to pre-1997 filers is required by the 1997 Budget Act; (2) the auction applicant pool should be so limited on grounds of equity; and (3) the Bureau's decision to dismiss pending applications was based on improper consideration of revenue enhancement as the basis for establishing auction rules.[37] Ranger/Miller raised these same arguments concerning the scope of the applicant pool for RSA auctions in the *RSA Auction* proceeding, and we rejected each of these arguments in the *RSA Auction Report and Order*.[38] Therefore, we need not address these arguments further here.

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36 *McElroy*, 86 F.3d at 248.

37 Ranger/Miller Petition at 7-15.

38 *RSA Auction Report and Order* at ¶¶16-21.

B. Hightower Application for Review

11. Hightower claims that the original lottery applicants for the RSAs at issue in this proceeding[39] are parties to implied-in-fact contracts with the Commission, which require the Commission to award licenses for these RSAs solely by lottery.[40] Hightower asserts that the Bureau's dismissal of all applications in these RSAs without having conducted relotteries constitutes a repudiation of these implied-in-fact contracts. Hightower further asserts that a complete breach of contract occurred when the Bureau awarded the licenses for the 2000 Act Markets,[41] and that upon auction of the remaining RSA markets, the Commission will be in similar complete breach as to the former lottery applicants for those markets.[42] Hightower claims that these alleged breaches entitle the original RSA lottery applicants to money damages, and requests that the Commission award these applicants $24.3 million (the alleged aggregate fair market value of the 2000 Act Markets) plus the proceeds of future RSA auctions.[43] The Bureau rejected Hightower's contract theory on reconsideration in the *Bureau RSA*

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[39] Hightower does not seek review of the dismissal of pending applications for RSA No. 599A.

[40] Hightower Application at 11.

[41] *Id.* at 13.

[42] *Id.* at 17.

[43] *Id.* at 21.

Dismissal Order[44] We conclude that the Bureau correctly dismissed these claims.

12. First, we find that the Commission lacks jurisdiction to entertain Hightower's claim for money damages. Indeed, Hightower concedes that "the issues [presented in its Application for Review] are within the exclusive jurisdiction of the United States Court of Federal Claims,"[45] and fails to cite any precedent supporting Commission jurisdiction, but merely states that it is raising these claims before the Commission out of an abundance of caution.[46] We agree with Hightower's conclusion that the Commission does not have jurisdiction over claims for money damages, and are unaware of any case, statute, or rule authorizing the Commission to award

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[44] *Bureau RSA Dismissal Order*, 16 FCC Rcd. at 4862 ¶5 & n.12.

[45] Hightower Application at 1.

[46] On August 6, 2001, a class action complaint and a motion seeking class certification of all applicants for the seven RSAs (except the disqualified tentative selectees) were filed with the Claims Court. *Folden v. United States*, Case No. 01-456C. Folden's complaint includes the same arguments made by Hightower in this proceeding. On October 5, 2001, the United States filed a motion to dismiss Folden's complaint. On November 1, 2001, the court granted the United States' motion to stay consideration of plaintiffs' motion for class certification pending the United States' motion to dismiss. The court heard oral argument on that motion on January 24, 2002.

money damages. This alone provides sufficient basis for dismissal of Hightower's claim.[47]

13. Even assuming *arguendo* that the Commission had jurisdiction to address Hightower's claim, we also agree with the Bureau's rejection of Hightower's contention that the Commission was contractually obligated to Hightower and other RSA applicants to award the RSA licenses by lottery.[48] The U.S. Court of Appeals for the D.C. Circuit has repeatedly held that the filing of an application with the FCC creates no vested rights in the applicant.[49] For example, in *Maxcell Telecom v. FCC*, the appellants, citing *Ashbacker Radio Corp. v FCC*, argued that the Commission had deprived them of their "right to

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[47] To the extent that plaintiffs in the *Folden* case are taking issue with the regulatory decisions of the Commission, their arguments belong before the Commission and the federal courts of appeals.

[48] *Bureau RSA Dismissal Order*, 16 FCC Rcd at 4862 ¶5 & n.12.

[49] *Bachow*, 237 F.3d at 687-88 (applicants for licenses had no "vested right" in enforcement of cut-off rules); *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1000-01 (D.C. Cir. 1999); *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997). In *Chadmoore,* the D.C. Circuit held that the FCC's reliance upon a new regulation to deny Chadmoore's application for extended implementation authority for construction of a wide-area specialized mobile radio system was neither arbitrary nor capricious. The court stated that the Commission's action did not "impair[] a right possessed by [Chadmoore] because none vested on the filing of its application." *Id.* at 241.

a comparative hearing" by switching to a lottery procedure open to new applicants.[50] The D.C. Circuit rejected the argument that an applicant possesses any right to a specific procedure for awarding a license, concluding that *Ashbacker* "found no such 'right,' but merely held that the Commission must use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license."[51] Similarly, in *Bachow v. FCC*, the court upheld the Commission's adoption of interim licensing procedures in the 39 GHz service during a transition from comparative hearings to competitive bidding rules, which permitted new applicants to file license applications following established cut-off dates for such licenses, thereby increasing the competition for licenses.[52] The *Bachow* court similarly cited the Commission's authority to "make midstream rule adjustments, even though it disrupts expectations and alters the competitive balance among applicants."[53] Finally, in *PLMRS Narrowband v. FCC*, the D.C. Circuit found that an applicant who filed an application under lottery rules did not thereby obtain a

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[50] *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987).

[51] *Id.* (citing *Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519, 1525-26 (D.C. Cir.), *cert. denied*, 469 U.S. 1017 (1984)).

[52] *Bachow*, 237 F.3d at 687.

[53] *Id.* at 687-88 (citing *Maxcell*, 815 F.2d 155; and *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997)).

"right" to processing by lottery.[54] We find that the change in Commission application procedures from awarding RSA licenses by lottery to awarding licenses by auction or pursuant to Congressional directive does not give rise to a claim for breach of contract.

14. Finally, we conclude that Hightower's implied-in-fact contract claim fails as a matter of government contract law. First, Hightower does not even allege that it entered into a contract with "an agent of the United States with actual authority to bind the government in contract."[55] Absent such a showing, Hightower cannot establish the existence of a contract with the United States.[56] Second, Hightower fails to demonstrate mutual consideration. As Hightower notes, the Commission charged lottery applicants a $200 application fee, which

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[54] *PLMRS*, 182 F.3d at 1000-01 (citing *Chadmoore*, 113 F.3d at 241; and *DIRECTV*, 110 F.3d at 825-26). *See also Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 590 (D.C Cir 2001) (rejecting argument that FCC rule change constituted a breach of contract).

[55] *Blais v. United States*, 31 Fed. Cl. 422, 428 (1994).

[56] *See City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991). Hightower cites only state law lottery precedent to establish the existence of contracts. Hightower Application at 10-11 n.28 (citations omitted). However, none of those cases is apposite because the unique requirements of an implied-in-fact Federal contract -- namely the specific acts of a Federal official with authority to bind the United States and to obligate Federal funds to the alleged contract -- do not apply to non-Federal contracts.

merely allowed the Commission to recover its application processing costs.[57] Hightower thus provided no consideration to the FCC for any alleged contract.[58] Consideration for a Government contract "must render a benefit to the government, and not merely a detriment to the contractor."[59] Because Hightower fails to allege that the Government obtained even a theoretical benefit from its license applications, its contract claim falls due to a failure of consideration. Third, Hightower fails to establish that by accepting lottery applications, the Commission intended to enter into binding contracts that would preclude the possibility of future rule changes that could modify the process by which licenses were awarded. Nothing in the lottery notices cited by Hightower indicates such an intent.

C. Ranger/Miller Application for Review

15. In their Application for Review, Ranger/Miller challenge the Division's grant of licenses for the 2000 Act Markets on several grounds. First, Ranger/Miller argue that the 2000 Act violates the constitutional separation-of-

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[57] Hightower Application at 16.

[58] *Girling Health Sys., Inc. v. United States*, 949 F.2d 1145, 1147 (Fed. Cir. 1997), *cert. denied*, 503 U.S. 940 (1992) (citing *Somali Dev. Bank v. United States*, 508 F.2d 817, 822 (Ct. Cl. 1974)) (there can be no contract that binds the Government in the absence of consideration).

[59] *Montefiore Hosp. Ass'n of W. Pa. v. United States*, 5 Cl. Ct. 471, 476 (1984).

powers doctrine because it overrules the final judgment of the D.C. Circuit affirming the Commission's original disqualification of the 2000 Act Applicants.[60] In the order below, the Division declined to address this argument based on established precedent that the Commission cannot declare an act of Congress void.[61] Ranger/Miller concede that "the Commission cannot itself declare an Act of Congress unconstitutional," but nevertheless urge us to ignore the implementing provisions of the 2000 Act. [62] We reject this request because the Commission has no authority to disregard statutory requirements imposed on it by Congress.

16. Ranger/Miller next argue that granting licenses to the 2000 Act Applicants violated the statutory prohibition in Section 309(i)(5) of the Act against the use of lotteries to award licenses after July 1, 1997.[63] Ranger/Miller claim that these licenses were awarded "by lottery" in violation of the statute because the 2000 Act Applicants were prior lottery winners. We find no statutory conflict here. First, Section 309(i)(5) only prohibits the Commission from using lotteries to select from among mutually exclusive applicants; it does not limit the authority of Congress to enact legislation selecting particular applications (based on prior lottery

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60 Ranger/Miller Application at 4-6.

61 *Great Western Order,* 16 FCC Rcd at 18769-70, ¶5 & n.11 (citing *Meredith Corp. v. FCC*, 809 F.2d 863, 873 (D.C. Cir. 1987)).

62 Ranger/Miller Application at 6.

63 *Id.* at 7.

results or any other factor) and directing the Commission to process them, as occurred in this case. Second, as we have noted above, the lotteries in which the 2000 Act Applicants participated occurred in 1989 and 1990, and Section 309(i)(5) does not apply to lotteries held prior to July 1, 1997.[64]

17. Ranger/Miller also claim that the 2000 Act did not mandate grant of licenses to the 2000 Act Applicants, but that Congress "simply intended for [their applications] to be reinstated" so that they could participate in an auction with other applicants.[65] Ranger/Miller contend that to assume that Congress did not intend to auction the 2000 Act Markets is inconsistent with the auction provisions of Section 309(j) and would therefore violate the rule of statutory construction that statutes shall not be repealed by implication.[66] Again, Ranger/Miller's attempt to demonstrate a conflict between the 2000 Act and the Communications Act is without merit. Section 309(j) authorizes the Commission to use auctions where the Commission is faced with mutually exclusive applications, but in this case, Congress designated a single applicant for each of the 2000 Act Markets and prohibited competing applications, so no mutual exclusivity could exist. Indeed, Section 1007(b)(5) of the 2000 Act specifically provided that the 2000 Act Markets would be open to new applications and auctions only if the Commission were to find any of the 2000 Act Applicants

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64 *See* para. 8, *supra*.

65 Ranger/Miller Application at 10.

66 *Id.* at 10-11.

ineligible for a license grant or if any of the 2000 Act Applicants failed to satisfy certain service requirements, neither of which occurred in this case.[67] We therefore reject Ranger/Miller's argument.

IV. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, pursuant to Section 1007 of the Launching Our Communities' Access to Local Television Act of 2000,[68] Sections 4(i), 309(i)(5) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309(i)(5), and 405, and Section 1.106(b) of the Commission's rules, 47 C.F.R. § 1.106(b), the Petition for Reconsideration filed by Ranger Cellular and Miller Communications, Inc. on April 2, 2001, is hereby denied.

19. IT IS FURTHER ORDERED that, pursuant to Section 1007 of the Launching Our Communities' Access to Local Television Act of 2000,[69] Sections 4(i), 309(i)(5) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309(i)(5), and 405, and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Application for Review filed by Hightower Communications, Inc. on April 2, 2001, is hereby denied.

20. IT IS FURTHER ORDERED that, pursuant to Section 1007 of the Launching Our Communities' Access

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[67] 2000 Act, § 1007(b)(5).

[68] District of Columbia Appropriations Act of FY 2001, Pub. L. No. 106-553, 114 Stat. 2762 (2000), Title X.

[69] *Id.*

to Local Television Act of 2000,[70] Sections 4(i), 309(i)(5) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309(i)(5), and 405, and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Application for Review filed by Ranger Cellular and Miller Communications, Inc. on November 1, 2001, is hereby denied.

21. IT IS FURTHER ORDERED that, pursuant to Section 1.115(d) of the Commission's rules, 47 C.F.R. § 1.115(d), the Amendment to Application for Review filed by Hightower Communications, Inc. on April 25, 2002, is hereby dismissed.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[70] *Id.*